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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-195

SUN SHIPBUILDING & DRY DOCK CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The petitioner, Sun Shipbuilding & Dry Dock Company, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Claims, granting summary judgment to the respondent on Count I of the First Amended Petition, and entered in this proceeding on May 31, 1974.

OPINION BELOW.

The order of the Court of Claims, not yet reported, appears in the Appendix hereto.

JURISDICTION.

The order of the Court of Claims was entered on May 31, 1974. A timely motion for rehearing *en banc* was denied on June 28, 1974, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1255(1).

QUESTIONS PRESENTED.

1. Whether a shipbuilder's right under the standard Maritime Administration subsidy contract to collect more than $1,600,000 (without interest) actually spent in the performance of extra work ordered by the United States and the Owner can be delayed for more than two (2) years after final administrative determination of its claim and almost nine (9) years after the performance of the work.

2. Whether the standard Maritime Administration subsidy contract precludes recovery of any of the shipbuilder's costs of performing extra work until ultimate judicial review of the dispute when such review may not be completed for more than fifteen (15) years after the work was performed.

3. Whether the standard Maritime Administration subsidy contract should be interpreted so as to require prompt payment of the shipbuilder's costs of performing extra work upon final administrative determination of the amount due so as to prevent *de facto* confiscation of the shipbuilder's claim.

STATUTORY PROVISIONS INVOLVED.

None. However, the relevant portions of the Maritime Administration subsidy contract which is involved are included in the Appendix hereto.

STATEMENT OF THE CASE.

In October 1962, the petitioner ("Sun") entered into the standard government Maritime Administration construction differential subsidy contract ("contract") whereby it was to build five cargo vessels for United States Lines, Inc. ("Owner") and was to be paid for these vessels by the Owner and the United States ("Government"). In May, 1963, Sun was ordered to proceed with two major changes which provided for automation of the vessels and rearrangement of the crew quarters. Sun completed these vessels including the extra work added by the changes, and delivered the last ship to the Owner in September 1965.

The following chronology lists the relevant events and the time consumed during the administrative disputes process:

Event	*Date*	*Elapsed Time*
1. Delivery Dates of Five (5) Ships	Nov. 12, 1964 Jan. 15, 1965 April 14, 1965 June 29, 1965 Sept. 24, 1965	
2. Sun Submits Final Estimate of Costs of Changes Pursuant to Article 4(d) of Contract ($5,200,000)[1]	Nov. 24, 1965	2 Months
3. Chief, Division of Estimates—Maritime Administration, Determination of Sun's Costs ($1,700,000)	Nov. 13, 1967	14 Months

1. All amounts rounded to nearest hundred thousand dollars. Reference to contract articles with Arabic numerals is to General Provisions of the contract, whereas reference to Roman numerals is to Special Provisions of the contract.

Event	*Date*	*Elapsed Time*
4. Chief, Office of Ship Construction — Maritime Administration, Determination of Sun's Cost ($2,200,000)	Aug. 21, 1969	47 Months
5. Appeal to Maritime Subsidy Board	Sept. 9, 1969	
6. Commencement of Hearing Before MSB Representative	Dec. 1, 1969	49 Months
7. Completion of Hearings Before MSB Representative	Jan. 20, 1970	50 Months
8. Recommended Decision of Board Representative Determining Sun's Costs ($3,800,000)	July 20, 1970	58 Months
9. Maritime Subsidy Board Determination of Sun's Costs $(2,800,000)	Sept. 24, 1971	72 Months
10. Secretary of Commerce Determination of Sun's Costs ($3,100,000)	Jan. 20, 1972	76 Months

Thus, Sun's claim for more than $5 million in costs expended at the unilateral direction of the Government and the Owner passed through five (5) levels of the Maritime Administration determinations and finally emerged more than six years later with the final administrative determination that the increased cost resulting from the changes was $3,070,547.95.[2]

2. The more than six year period required to exhaust the disputes procedures under the Maritime Administration's subsidy contract is not unique. See, *e.g., Sun Shipbuilding & Drydock Co. v. United States*, 198 Ct. Cl. 693, 461 F. 2d 1352, *cert. denied*, 409 U. S. 1023 (1972). In that dispute, which similarly involves the amount due the shipbuilder for the performance of change orders, the actual

The final administrative decision having been rendered, Sun, on February 8, 1972, in accordance with Article IV of the contract, submitted applications for progress payment number 47 to the Owner and the Government. These progress payments represented amounts added to the contract price by the change orders, which amounts had now received final administrative approval. The Government paid its share of the progress payment. When the Owner refused to pay, Sun noticed the Owner's default under Article 31 of the contract. [Paragraphs 6-9, First Amended Petition]. Pursuant to Article 31, the Government was required to respond to this notice by giving notice of optional termination or by assuming the obligations of the Owner to complete payments. Much to the astonishment of Sun, who had been waiting almost seven years to receive the contractually stipulated progress payments for the extensive work covered by these change orders, the Government refused to comply with the provisions of Article 31. This refusal was a breach of contract which led to Count I

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2. (Cont'd.)

work was done in 1964-1967 with the last ship being delivered on September 15, 1967. Sun's estimate of costs was originally submitted in December 1967 and substantially amended in July 1970. There was a Division of Estimates decision in April 1967 and decisions by the Chief, Office of Ship Construction in December 1970 and January 1972. Hearings before the Maritime Subsidy Board's Representative were begun in March 1973 and completed in July of that year. The matter is still pending before the Board's Representative. Thus almost seven years have passed since Sun delivered the last ship, but its $17,000,000 claim still must pass through three (3) additional levels of the Maritime Administration before it will receive the final administrative decision.

Moreover these inordinate delays do not apply only to Sun's claims. On June 17, 1974, the Maritime Subsidy Board decided the dispute in *Bethlehem Steel Corp. v. Grace Lines, Inc.*, C. A. 44, which arose out of change orders on 3 ships delivered in February, June and August 1963. This dispute is now before the Secretary of Commerce, and thus the final administrative determination will probably not be made until more than eleven (11) years after delivery of the ships.

of the First Amended Petition,[3] the jurisdictional basis in the Court of Claims being under 28 U. S. C. § 1491.

The sole basis of the Government's argument was that the Owner was not in default, *i.e.*, that no progress payments were due and payable by the Owner because the amount due under the change orders had not yet been "finally determined" under Article 4.[4] [Government Cross Motion for Summary Judgment, pages 2, 8.] The position of the Government was upheld by the Court of Claims in a brief Order of May 31, 1974, which treated the merits of the case in one sentence:

> Because third-party's defenses might result, through collateral estoppel, in reducing the Board's award to plaintiff, that award cannot be viewed as a "final" one to which plaintiff is entitled at this time as a matter of law.[5] (Order at page 3. See Appendix.)

After a motion for a rehearing *en banc* was denied on June 28, 1974, this petition followed.

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3. Count II, which was added by amendment, is completely unrelated to Count I and is a Wunderlich Act appeal against the Government, contesting certain aspects of the Secretary's award. A motion for summary judgment on Count II is presently being prepared by Sun.

4. "One hundred and ten percent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the contract price as an adjustment thereof." Article 4(c).

5. The reference to "third-party's defenses" is to the fact that the Government brought the Owner into the litigation pursuant to Court of Claims Rule 14. The Owner then attempted, as an "affirmative defense," to raise new issues not raised by Sun on the Wunderlich Act appeal involved in Count I. Since resolution of these issues adversely to Sun might result in a reduction of the award already granted notwithstanding the fact that the Government did not appeal, Sun moved to strike this affirmative defense on the ground that it was really the assertion of a claim by the Owner against Sun and that the Court of Claims lacked jurisdiction. The Court of Claims, *en banc*, overruled the trial judge and allowed this affirmative defense to stand. Since this issue relates to Count II rather than Count I, it is not raised in or relevant to this petition.

REASONS FOR GRANTING THE WRIT.

1. The Court Below Interpreted the Standard Maritime Administration Contract So as to Substantially Confiscate the Shipbuilder's Claim.

The question in this case is whether the oft-cited quotation "Justice delayed is Justice denied" has any application to construction disputes before the Maritime Administration arising out of its standard subsidy contract. The court below decided that the contract precluded any recovery of the shipbuilder's costs until the last possibility of judicial review has been exhausted. The effect of this decision is to add the many additional years required to complete judicial review upon the almost seven (7) years it took for the administrative disputes clause to run its leisurely course before the shipbuilder can recover (without interest) its costs.

This is directly contrary to the statement of this Court in *S & E Contractors, Inc. v. United States*, 406 U. S. 1, 20 (1972) (Blackmun, J., concurring):

> By accepting the disputes clause in his contract, the contractor bears the interim financial burden and gives up the right of rescission and the right to sue for damages. What he received in return is the Government's assurances of speedy settlement and of prompt payment, not payment delayed for months or, as here, for years.

In the case at bar, the extra work involved in the automation and crew quarter changes was performed by Sun in 1963, 1964 and 1965, with the last ship being delivered in 1965. The lowest amount at which its work was ever valued by the Board was 1.6 million dollars. Sun waited almost seven years for the final administrative decision

without this money. In 1972, it received the final administrative decision entitling it to over three million dollars. The Government, recognizing its liability under that decision, made progress payments based on this amount but decided that the Owner was not yet obligated to make progress payments because Sun or the Owner might appeal.[6] Two years later, in 1974, the Court of Claims decided that Sun still was not entitled to any payments on account of change orders until its right to the exact amount finally due was established as a matter of law.[7]

Sun can only speculate upon when its rights will be finally established as a matter of law. Sun is presently litigating the administrative award in the Court of Claims under Count II of this very petition. The Owner is participating in this litigation as a third party. (See footnote 5, *supra.*) If Sun prevails, is the Owner collaterally estopped from relitigating these issues in another forum?

6. But see: "provided, however, that in the event the failure of the Owner involves a matter as to which the Owner has appealed to the Board pursuant to Article 36 . . . such notice [of default] shall not be given *until after the Board's decision* if the payment in question is the subject of the appeal . . . ." Article 31(a). (Emphasis added). Also the Owner in this case has recognized its obligation to make payments in accordance with the Maritime Subsidy Board's Final Decision. Thus in arguing before the Board that Sun was not entitled to interest until the amount of the claim could be demanded, the Owner stated: "Clearly since Sun cannot properly demand payment until after the Board's decision, . . . Sun may not recover interest, unless and until, it gives proper notice of default after the Board's decision in accordance with Article 31 of the contract." U. S. Lines' Reply to Sun's Exceptions to the Recommended Decision, pp. 3-4.

7. But see: "All other amounts [excluding progress payments] payable to the Contractor pursuant to this Contract [final five percent on last vessel] shall be paid by the Owner and the Board within 30 days after (a) the Owner has notified the Board that all delivery and guarantee obligations have been satisfied, and (b) the Board has determined that all disputes and all claims under the Contract have been *settled or finally adjudicated*, and has also determined the final contract price." Article III(d)(iii). (Emphasis added).

As can be seen from the opinion of the Court of Claims, quoted at page 6, *supra*, that court does not know. Must Sun wait to see whether the Owner will sue in another forum before it again applies for a progress payment? How long must it wait? Assuming that the applicable statute of limitations is six years, under the decision of the Court of Claims Sun is not entitled even to progress payments on major change orders authorized in 1963 until 1978. Of course, this does not mean that Sun receives the money in 1978 but only that it may first sue for the money as of that time. Thus, Sun will not become entitled to its money without interest for services furnished until more than fourteen years after the work has been performed.

A simple example will depict the effect of such a procedure. Assume the shipbuilder's cost incurred on account of changes was $1,000,000. Assume further that like most contractors it was forced to borrow funds to finance those large cash expenditures. Finally assume that the rate of interest paid on that loan was 6 percent compounded annually. Given these assumptions, a contractor which actually receives its full claim after seven (7) years will find that over one-third of its costs have not been recovered. Although it has recovered $1,000,000, it has expended $1,000,000 in change-caused costs plus more than $500,000 in interest on the loan to finance those costs or a total of more than $1,500,000. Thus, the contractor has in actuality recovered less than two-thirds of the actual costs resulting from the change.

This Court has never hesitated to take *certiorari* jurisdiction to resolve important questions of interpretation of standard government contracts. *E.g., United States v. Blair*, 321 U. S. 730 (1944). It is difficult to imagine a more important question of interpretation than this case poses. The purpose of the legislation giving rise to maritime construction differential subsidy contracts was to aid and sub-

sidize the domestic shipbuilding industry, and to enable United States operators to purchase their vessels at world prices.[8] But, if the Court of Claims' interpretation of the standard contract is permitted to stand, the shipbuilder's legitimate claims for recovery of costs incurred are in large measure confiscated. Fundamental consideration of fairness and due process require that the contract be interpreted to require at least progress payments upon completion of the lengthy administrative disputes process.

2. The Decision of the Court of Claims Ignores the Language of the Contract and Is Clearly Erroneous.

As previously stated, the issues presented arose upon the failure of the Owner and the Government to make the required progress payments on change orders after the final administrative decision had determined the amount due on the change orders involved. Article IV(a)(ii) of the contract provides in detail for the payment of progress payments as the work progresses, including progress payments on amounts added to the contract price by change orders. Progress payments are restricted only in that they may not exceed ninety-five percent of the value of the work already performed and the material already delivered, and a similar ninety-five percent restriction applies to progress payments on net increases in the contract price on account of change orders (Article IV(b)(ii)).[8a] Payment of the re-

8. See, *e.g.*, method of determining amount of subsidy by comparison with cost of foreign construction. 46 U. S. C. § 1152(b).

8a. It is extremely ironic that the holdback concept employed by the contract to limit progress payments is intended to insure that the contractor performs. However, under the interpretation of the contract which has been adopted, *no* progress payments at all on change orders are forthcoming long after the contractor has performed fully and completely. Therefore, the holdback concept is grossly expanded so that it eliminates progress payments on change orders entirely (see text page 14, *infra*), and the purpose of this expanded holdback becomes the illegitimate one of coercing the contractor to settle for a fraction of the value of the extra work.

maining five percent due on the contract is covered by Article IV(d), which provides for 2½ percent of the amount withheld as to all but the last vessel to be paid upon delivery of such vessels and the other 2½ percent as to these vessels to be paid after the final guarantee survey (with a proviso not here relevant). Provision is made for the payment of the five percent holdback on the last vessel as follows:

> All other amounts payable to the Contractor pursuant to this Contract shall be paid by the Owner and the Board within thirty (30) days after (a) the Owner has notified the Board that all delivery and guarantee obligations have been satisfied, and (b) the Board has determined that all disputes and all claims under the Contract have been settled or finally adjudicated, and has also determined the final contract price. (Article IV(d)(iii))

If the Owner shall fail to make a progress payment (or any other payment), Article 31 of the contract provides that the Contractor (Sun) may give the Owner written notice of such failure. However:

> . . . in the event that the failure of the Owner involves a matter as to which the Owner has appealed to the Board pursuant to Article 36 of these General Provisions, such notice shall not be given *until after the Board's decision* if the payment in question is the subject of the appeal . . . . (Article 31(a). (Emphasis added.))

If the Owner fails to pay within 15 days, Article 31(b) provides that the Contractor may deliver a notice of default to the Owner. If no payment is made within 15 days after service of this notice, Article 31(c) requires the Maritime Subsidy Board to take one of two actions. It may assume

the obligations of the Owner to complete the payments required under the contract, or it may give notice of optional termination under Article 28, under which the contractor in general receives payment for the work performed up to the date of such termination.

The procedure to be followed in the case of change orders is set forth in Article 4, which provides that the Contractor shall promptly furnish the Owner its final estimate of the increased costs resulting from the change. Paragraph (e) of that article provides that the Owner shall then transmit the Contractor's final estimate to the Board which:

> . . . shall, as soon as practicable, approve or disapprove the Contractor's estimate. . . . Notwithstanding a dispute in connection with the Contractor's estimate of the cost of a change, the Contractor shall, nevertheless, proceed promptly with the work covered by such directed or approved change. One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the contract price as an adjustment thereof. . . .

It can thus be seen that the contract price is increased when the change cost estimate is "approved" or is "finally determined." Once the contract price is increased, this additional amount is eligible for progress payments under Article IV(a)(ii), and, if the Owner fails to make those progress payments, the Board must step in and assume payments or terminate the contract and compensate the Contractor. Of course, there is one limitation upon the implementation of Article 31. If the Owner has invoked the disputes clause as to the payment involved, notice of

failure to pay cannot be given until after the Board decision.

Thus the question becomes what does "as approved or as finally determined" mean? The Government, at page 8 of its brief supporting its cross motion for summary judgment opines that approved "clearly refers to matters as to which the parties have reached an agreement as to cost." In other words, "approved" clearly means "agreed." It is submitted that "approved" means "approved" unless the contract clearly defines it to mean something entirely different when used in the contract.[9] Article 4(e) could hardly be more clear as to what it means by "approved". It means the initial Board approval:

> The owner shall transmit such statement to the Board which . . . shall, as soon as practicable, approve or disapprove the Contractor's estimate.

Of course, Article 4(e) goes on to state: ". . . or as finally determined." This is because Article 31 protects the Owner from making progress payments on matter as to which it has invoked the disputes clause until after the Board's decision, and it is to this Board decision that Article 4(e) refers with the language "finally determined." It is here that the Government and the Court of Claims disagree. Under the holding of the Court of

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9. "The objective in interpreting a contract is to determine the intention of the parties. The language of the contract must be given the meaning that would be understood by a reasonably intelligent person acquainted with the contemporary circumstances. . . . All provisions of the contract should be read together and so as to make none inoperative, and specific provisions should be given precedence over general ones. . . . If the contract is unambiguous its language should be implemented."
Dravo Corp. v. United States, 480 F. 2d 1331, 1333 (Ct. Cl. 1973).

Claims, "finally determined" apparently means when the final contract price is established "as a matter of law," *i.e.*, after the last possibility of further judicial review of the administration of the contract has been exhausted.

The problems with the interpretation of this clause by the Court of Claims are manifold. First of all, it completely reads out of the contract that portion of Article 31 which merely delays the obligation of the Owner to pay "until after the Board's decision." If the Government and the Court of Claims are correct in their interpretation, the obligation of the Owner is delayed much longer than after the Board's decision, and this clause in Article 31 becomes nonsensical.

Secondly, the interpretation of the court below adds a proviso to Article IV(a)(ii), eliminating from that section progress payments where the disputes article has been invoked. Under this interpretation, an approved estimate cannot be added to the contract price where a dispute is involved until the dispute has been settled, or judicial review has been exhausted. But at this point in time the five percent holdback on the last vessel becomes due:

> All other amounts payable . . . shall be paid . . . within thirty (30) days after . . . the Board has determined that all disputes and all claims under the Contract have been settled or finally adjudicated, and has also determined the final contract price.

Article IV(d)(iii). Since almost all major change orders will involve some dispute, this interpretation almost entirely eliminates Article IV(a)(ii). Note also that, when the contract desires to refer to a final determination as a matter of law, it knows how to say it: "all disputes and all claims under the Contract have been settled or finally adjudicated." On the other hand, the words "final" and

"determination" are commonly used to refer to administrative decisions.[10] For example:

> The Miller Act provides that suit must be brought within one year after the date of final settlement of the contract. . . . And this date, as certified by the Comptroller General, is conclusive upon the parties. . . . It is generally considered to be the date on which the administrative officer in charge of the contract determines and records the final amount due under the contract. . . . It does not denote payment but a *final determination* of every prerequisite to payment, such as satisfactory completion of the contract, a statement of the account, and approval of the account by an authorized officer.

United States v. T. W. Cunningham, Inc., 141 F. Supp. 205, 210 (D. Me. 1956). (Emphasis added.) And the Indian Claims Commission Act does not permit an appeal until there has been a "final determination" by the Commission. 25 U. S. C. § 705.[11] Finally, even the senior vice president of the Owner used this language to refer to the final administrative decision in this case in his letter of March 16, 1972 to the Maritime Administration and Sun, attached to the Government's brief in support of its cross motion for summary judgment as Exhibit B:

> This is to advise and confirm that United States Lines, Inc. has offered and continues to offer to pay to Sun Shipbuilding & Dry Dock Co. its share in full of the remaining unpaid amount of the Contract Price under

10. For example, the Department of Commerce Regulations for Practice Before Maritime Subsidy Board refer to the Final Decision of the Maritime Subsidy Board. 46 C. F. R. § 201.167 (1973).

11. See also quotations from *Crown Coat Front Co. v. United States*, 386 U. S. 503, 511-12, 513-14 (1967) and *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 251-52, 368 F. 2d 847, 859 (1966), *infra* at pp. 16-17.

> Contract No. MA/MSB-11, including the amount *finally determined* to be due by the Secretary of Commerce, in return for an appropriate release to United States Lines from Sun Shipbuilding & Dry Dock Co. (Emphasis added.)

3. The Interpretation Adopted by the Court of Claims Is Inconsistent With Well Established Precedents of This Court as Well as of the Court of Claims.

The holding of the Court of Claims that demands for payment of progress payments cannot be made until there has been a final judicial determination of the amount due is contrary to established practice and prior decisions. It is well established that a government contractor cannot bring suit in the Court of Claims until he has exhausted his administrative remedies and has the right to demand payment from the Government:

> Under the contract we have here, the contractor's claim was subject only to *administrative, not judicial, determination* in the first instance, with the right to resort to the courts only upon the making of that administrative determination.
>
> * * *
>
> Only if it is alleged and proved that the *administrative determination* was arbitrary, capricious, or not supported by substantial evidence may the court refuse to honor it. This much is clear not only from the disputes clause itself but from the Wunderlich Act. In that statute . . . Congress widened the scope of judicial review but at the same time recognized the finality of the administrative decision absent the specified grounds for setting it aside. The focus of the court action is the validity of the administrative

> decision. Until that decision is made, the contractor cannot know what claim he has or on what grounds administrative action may be vulnerable. *It is only then that his claim or right to bring a civil action against the United States matures and, as the Court of Claims said, that he has "the right to demand payment* . . . the hallmark of accrual of a claim in this court."

Crown Coat Front Co. v. United States, 386 U. S. 503, 511-512, 513-14 (1967). (Emphasis added.) (Footnote omitted.) And, as the Court of Claims stated in *Nager Electric Co. v. United States,* 177 Ct. Cl. 234, 251-52, 368 F. 2d 847, 859 (1966) (Footnote omitted.) the case from which this Court quoted in *Crown Coat Front:*

> To say that he must bring suit even though the Board has not yet acted is to require him to file his petition here when he cannot fulfill the requirements of the Wunderlich Act for seeking relief, and indeed before he can say that he has "suffered any damages" . . . since the Board can and may give him full recompense. The final component of the contractor's injury is the failure of the Board to act as it should—that is the ultimate breach. For that reason, as we have said, he cannot properly demand payment from the Government until the administrative remedy has been pursued; and the right to demand payment has, from the beginning, been the hallmark of accrual of a claim in this court.

But, under the Court of Claims interpretation in this case, the contractor does not have the right to demand payment at the end of the administrative process. Instead, a circuity problem is created. The contractor cannot demand a progress payment until all disputes as to the amount of

the change order have been judicially determined, but it cannot get to court to attain a judicial determination until it has the right to demand payment. All of this simply returns one to the fundamental lack of soundness of any interpretation of a government contract with built-in disputes machinery which holds that, at the end of seven (7) years of administrative proceedings, there is still no resolution of the dispute and the contractor must continue to wait for his money for many many more years.

4. Conclusion.

While a shipbuilder's acceptance of the Government's contract of adhesion results in the waiver of many of its normal rights, the contract can not be interpreted so as to confiscate its property. The Government (and the Owner) undoubtedly possess the right unilaterally to order substantial additional work by way of change orders. However, it is just as clear that they must pay the Contractor the costs of that extra work. A construction of the Government's contract which delays for more than a decade the actual recovery of the Contractor's out of pocket expenditures effectively erases from the agreement the obligation to pay the Contractor.

The law of contracts, even of government contracts, is supposedly well settled to the effect that ambiguities in the contract are to be resolved against the drafter. *E.g., General Warehouse Two, Inc. v. United States,* 181 Ct. Cl. 180, 389 F. 2d 1016 (1967); *C. S. Montage & Sons v. United States,* 172 Ct. Cl. 501, 348 F. 2d 954 (1965). Since the Court of Claims failed to set forth any rationale for its decision in its opinion, it will never be known whether that court was of the opinion that the contract was ambiguous. However, it is certain that the Government's interpretation cannot be adopted pursuant to any

plain meaning rule.[12] In fact, the Government's position in this litigation is contrary to its prior action in paying Sun its share of progress payment No. 47.[13]

Nowhere has the Court of Claims referred to any contractual language supporting the proposition that Contractors must await payment for as long as fourteen years, without interest, on multi-million dollar change orders. This decision presents a question of general importance to domestic shipbuilders. It is a decision which strikes at the heart of the legislation authorizing construction differential subsidies and which is inconsistent with settled law. It is submitted that it is a question which should be accepted for review by this Court.

Respectfully submitted,

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12. See, *e.g.*, Government argument set forth *supra* at pp. 12-13.

13. The Government, at page 9, footnote 1, to its brief in support of its cross motion for summary judgment, attempted to explain this payment as an "exercise of administrative discretion." The payment of public funds is not a discretionary matter. See 31 U. S. C. § 82(c), holding liable a certifying officer, *inter alia*, "for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved."

Appendix.

IN THE
UNITED STATES COURT OF CLAIMS

No. 61-73.

SUN SHIPBUILDING & DRY DOCK CO.

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, SKELTON and KUNZIG, *Judges*.

ORDER.

This case comes before the court on plaintiff's Motion for Summary Judgment on Count I of plaintiff's First Amended Petition and on defendant's Cross Motion for Summary Judgment thereon.

This is a tri-partite ship subsidy case wherein the plaintiff, Sun Shipbuilding Company, contracted to build certain ships for United States Lines (USL), the shipowner, and USL and the defendant, United States, acting through the Maritime Subsidy Board (Board), each agreed to pay a proportionate part of the costs. During the performance of the contract, two change orders were made and a dispute arose as to the amount due the plaintiff by reason of the change orders. A decision was issued by the Board, as modified by the Secretary of Commerce (Secre-

tary). The defendant paid its part of the award, but USL refused to do so, claiming it was excessive for various reasons. The plaintiff then demanded that the defendant pay USL's part of the award, claiming that the contract required it to do so. When the defendant refused, the plaintiff filed this suit, contending in Count I of its petition that it is entitled to summary judgment against defendant for the amount of the Board's award, including USL's part. In Count II of the petition, plaintiff seeks to increase the amount of the award of the Board, as modified by the Secretary. The defendant made USL a third party defendant by having a notice issued to it under Rule 41. USL has appeared and filed pleadings in which it asserts various defenses to the award of the Board, contending it is excessive, and contesting plaintiff's attempt to increase the Board's award. USL's defenses are directed to Count I as well as to Count II of plaintiff's petition.

The court issued an order today in granting USL's request for review of the trial judge's order of December 20, 1973, in which the trial judge partially allowed plaintiff's motion to strike the Second Affirmative Defense of USL. The court reversed the decision of the trial judge and held that under 41 U. S. C. § 114(b) and Rule 41, USL as a properly noticed third party defendant, "is free and competent to present any *defense* it wishes to both counts of the petition," citing *Bowser, Inc. v. United States and General Steel Tank Co.*, 190 Ct. Cl. 441, 445-46, 420 F. 2d 1057, 1060-61 (1970). The court further held that a third party defendant is not restricted to assisting the defendant, but, as stated in the *Bowser* case, may also "offer additional evidence on its own behalf and advance such legal contentions as it deems appropriate in the protection of its interest."

In so holding the court observed:

Insofar as the points raised in the Second Affirmative Defense may, if accepted by the court, tend to show, in addition to the lack of merit in plaintiff's claim for an additional award, that the Secretary's award was itself excessive or erroneous, the third party will not be able in this litigation to obtain an affirmative judgment to that effect or reducing the award. (The separate question of the impact of the doctrine of collateral estoppel on a future private suit between third party and plaintiff will be for the other tribunal to determine.)

Because third-party's defenses might result, through collateral estoppel, in reducing the Board's award to plaintiff, that award cannot be viewed as a "final" one to which plaintiff is entitled at this time as a matter of law.

The court concludes that it necessarily follows that plaintiff's Motion for Summary Judgment on Count I must be denied. Count II is not before us for decision.

Accordingly, Plaintiff's Motion for Summary Judgment on Count I is denied and Defendant's Cross Motion for Summary Judgment on Count I is granted and Count I is dismissed from plaintiff's petition, and the case is remanded to the trial judge for trial on Count II of plaintiff's petition.

BY THE COURT

WILSON COWEN,
Chief Judge.

May 31, 1974

IN THE
UNITED STATES COURT OF CLAIMS

No. 61-73.

SUN SHIPBUILDING & DRY DOCK CO.

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, SKELTON and KUNZIG, *Judges*.

ORDER.

This case comes before the court on plaintiff's motion, filed June 12, 1974, for rehearing *en banc* pursuant to Rules 7(d) and 151(b). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

WILSON COWEN,
Chief Judge.

June 28, 1974

RELEVANT PROVISIONS OF CONTRACT.

Contract No. MA/MSB-11

CONTRACT
FOR THE CONSTRUCTION OF
SINGLE SCREW CARGO VESSELS
MA DESIGN C4-S-64a
FOR
UNITED STATES LINES COMPANY

THIS CONTRACT, entered into as of the 10th day of October 1962 by and between the UNITED STATES OF AMERICA, represented by the Secretary of Commerce, acting by and through the MARITIME SUBSIDY BOARD (said Secretary of Commerce acting by and through the Maritime Subsidy Board being herein called the "Board"), UNITED STATES LINES COMPANY, a corporation organized under the laws of the State of New Jersey (hereinafter called the "Owner"), and Sun Shipbuilding and Dry Dock Company, a corporation organized under the laws of the State of Pennsylvania (hereinafter called the "Contractor");

WITNESSETH:

WHEREAS:

1. Pursuant to Sections 501(a) and 504 of the Merchant Marine Act, 1936, as amended (herein referred to as the "Act"), all of the applicable requirements of Title V of the Act, and other applicable provisions of law, the Owner, a citizen of the United States, has made application to the Board for a construction-differential subsidy to aid in the construction of five (5) single screw cargo vessels, MA Design C4-S-64a (herein called the "Vessels"), to be used in the foreign commerce of the United States; and

2. The Owner has represented and the Board has determined that (a) the Plans and Specifications call for the construction of vessels which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (b) the Owner possesses the ability, experience, financial resources, and other qualifications necessary to enable it to operate and maintain the Vessels; and (c) the granting of the aid applied for is reasonably calculated to replace worn-out or obsolete tonnage with new and modern ships, or otherwise to carry out effectively the purposes and policy of the Act; and

3. The Board has approved the Plans and Specifications for the construction of the Vessels as submitted by the Owner; and

4. The Board has submitted the Plans and Specifications for the construction of the Vessels to the Department of the Navy and has received the required approval thereof; and

5. The Owner, in accordance with Section 504 of the Act, desires to finance its portion of the cost of the construction of the Vessels; and, in accordance with the Owner's application, the Board has permitted the Owner to obtain and submit to the Board the competitive bids from domestic shipyards for such work; the Contractor has submitted a bid; the Owner desires to have the Vessels built in the Contractor's shipyard; the Board considers the bid of the Contractor to be fair and reasonable and has approved it; and the Board desires to become a party to the contract for the construction of the Vessels and has, by contract issued simultaneously herewith, agreed to pay a

construction-differential subsidy in an amount determined by the Board in accordance with Section 502 of the Act.

NOW, THEREFORE, in consideration of the premises and of the mutual promises hereinafter set forth, the parties hereto agree as follows:

SPECIAL PROVISIONS

ARTICLE I. *General Statement of Work.* (a) The Contractor shall furnish all labor and material and shall perform all work necessary to construct, build, complete and deliver, at its own risk and expense, five single screw cargo vessels, MA Design C4-S-64a (herein called the "Vessels"), in strict accordance with the Plans and Specifications referred to in Article II hereof, including National Defense features, and will do everything required of the Contractor by this contract (these Special Provisions, the General Provisions approved by the Board on May 25, 1961. referred to at 26 Federal Register 5039 and made a part hereof, and the Plans and Specifications are all hereafter called the "Contract"), including the installation of any outfitting and equipment which the Plans and Specifications provide shall be furnished by the Owner and including the development of working plans, all for the consideration of Fifty Two Million Nine Hundred and Fifty Thousand Dollars ($52,950,000.) (herein called the "Contract Price"), together with such additions and subject to such deductions as are herein provided.

(b) The Vessels shall be identified as Maritime Administration Hull Nos. 146, 147, 148, 149 and 150 and Contractor's Hull Nos. 628, 629, 630, 631, and 632 and shall be constructed in the Contractor's plant or shipyard (herein called the "Shipyard"), located at Chester in the State of Pennsylvania. Upon completion of the work, as required by the Contract, and after passing the tests provided in the

Contract, each Vessel as completed shall be delivered to the Owner, after five (5) days' notice to the Owner, alongside a safe and accessible pier at the Shipyard, where there must be sufficient water for such Vessel always to be afloat, custom to the contrary notwithstanding; free and clear of all liens and claims of every nature except those arising out of the acts or omissions of the Owner or the Board, such delivery and acceptance by the Owner to be subject, however, to any guarantees provided in the Contract. Upon such delivery, the Owner shall give the Contractor a receipt for the Vessel and shall within five (5) days thereafter, remove or cause the Vessel to be removed from the Shipyard.

(c) The work to be performed hereunder shall be commenced immediately shall be prosecuted with due diligence, and shall be completed and delivery of each Vessel (in all respects complying with the terms of the Contract) made on or before the delivery dates in the following schedule:

Administration Hull Numbers	*Contractor's Hull Numbers*	*Contract Delivery Date*
146	628	Sept. 29, 1964
147	629	Dec. 13, 1964
148	630	Feb. 26, 1965
149	631	May 12, 1965
150	632	July 26, 1965

* * *

ARTICLE IV. *Payment of Contract Price.* (a) Progress payments on account of the Contract Price, adjusted as herein provided, shall be made to the Contractor by the Owner and the Board as the contract work progresses. The amounts of such payments shall be determined substantially in accordance with the usual Board practice of

dividing the Contract Price into points representing the estimated cost of labor and material of the various components of the Contract Price and measuring such progress by the per cent of completion of said portions of the Contract Price as attested by representatives of the Board, the Owner and the Contractor. Such progress payments shall be made at monthly intervals, or at such other intervals as the parties agree, as follows:

(i) The Board shall pay the Contractor forty eight and six tenths per cent (48.6%) and the Owner shall pay the Contractor fifty one and four tenths per cent (51.4%) of that portion of each progress payment on account of the Contract Price set out in Article I(a) hereof (excluding, however, the sum of Ninety Thousand Five Hundred Dollars ($90,500.) of the Contract Price for the National Defense features incorporated in the Vessels).

(ii) The Board shall pay the Contractor forty eight and six tenths per cent (48.6%) and the Owner shall pay the Contractor fifty one and four tenths per cent (51.4%) of that portion of each progress payment on account of the net increase in Contract Price, pursuant to Article 4 of the General Provisions, for changes in the contract work approved by the Board as eligible for construction-differential subsidy; provided, however, in the event there is a net decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner and the Board pursuant to this Article IV shall be reduced by the respective percentages of such net decrease.

(iii) The Board shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment on account of Ninety Thousand Five Hundred

Dollars ($90,500.) of the Contract Price set out in Article I(a) hereof for the National Defense features incorporated in the Vessels.

(iv) The Board shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment on account of the net increase in the Contract Price, pursuant to Article 4 of the General Provisions, for changes in the Plans and Specifications of the National Defense features; provided, however, in the event there is a net decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Board pursuant to this Article IV shall be reduced by the amount of said net decrease.

(v) The Owner shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment covering increases in the Contract Price pursuant to Article 4 of the General Provisions hereof on account of changes of the Owner approved by the Board but not approved as eligible for construction-differential subsidy provided, however, in the event there is a decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner shall be reduced by the amount of such decrease.

(b) The aggregate of the progress payments provided in (a) above shall not be in excess of:

(i) Ninety-five per cent (95%) of the value (as represented by the Contract Price set out in Article I(a) hereof) of the work performed and materials delivered to the Shipyard for the construction of the Vessels (subject, however, to the provisions of paragraph (c) of this Article); plus

(ii) Ninety-five per cent (95%) of any cumulative net increase in Contract Price pursuant to Article 4 of the General Provisions, as of the date of said partial payment; or minus

(iii) Ninety-five per cent (95%) of any cumulative net decrease in Contract Price determined pursuant to Article 4 of the General Provisions, as of the date of said partial payment.

(c) The Board and Owner may, on such terms and conditions as the Board may prescribe, include as part of the value of the work performed on the Vessels, work performed by any subcontractor on materials, machinery or equipment to be installed in the Vessels, although not yet delivered, if the title to such materials, machinery or equipment included as part of the value of the work done on the Vessels shall have vested in the Contractor, subject, however, to the subcontractor agreeing to bear the risk of loss of such materials, machinery or equipment until delivered to the Shipyard, and provided, however, that all amounts included in respect of any such subcontractors' work shall be paid to the subcontractors within thirty (30) days.

(d) The amounts withheld under the provisions of paragraph (b) of this Article (IV) plus any other amounts payable to the Contractor under the terms of the Contract shall be paid as follows:

(i) One-half of the amount so withheld as to each Vessel, except the last Vessel, shall be payable promptly after the delivery of such Vessel.

(ii) The remaining one-half of the amount withheld as to each Vessel, except the last Vessel, shall be paid promptly upon completion of the final guarantee survey of such Vessel held pursuant to Article

14(c) of the General Provisions of the Contract, less, however, any amount required by the Board to be withheld as additional security to protect the Owner and the Board with respect to all remaining contractual obligations of the Contractor, including the cost of remedying any remaining delivery or guarantee deficiencies and any disbursements by the Owner pursuant to Article 14 of the General Provisions, and neither the Contractor nor anyone claiming through the Contractor shall have any claim against such withheld amounts unless and until such obligations and guarantee deficiencies are remedied. The Owner and the Board may apply such withheld amounts towards the payment of or reimbursement for the expense of fulfilling such contractual obligations and remedying such deficiencies and the Contract Price and progress payments shall be adjusted and satisfied accordingly. Any amounts remaining of such deductions after remedying such deficiencies shall, however, be thereafter payable progressively promptly as such obligations and deficiencies are settled, except with respect to the last Vessel.

(iii) All other amounts payable to the Contractor pursuant to this Contract shall be paid by the Owner and the Board within thirty (30) days after (a) the Owner has notified the Board that all delivery and guarantee obligations have been satisfied, and (b) the Board has determined that all disputes and all claims under the Contract have been settled or finally adjudicated, and has also determined the final contract price.

(e) No payments shall be made except on bills, vouchers, or invoices submitted in such number or form and executed and attested in such manner as shall be prescribed by the Owner with the approval of the Board.

(f) The books, files and all other records of the Contractor and of any holding, subsidiary, affiliated or associated company shall at all times be subject to inspection and audit by representatives of the Board.

(g) The Vessels and the Shipyard of the Contractor shall at all times be subject to inspection by the Board and the Owner.

* * *

FEDERAL MARITIME BOARD
CONSTRUCTION CONTRACT
PART II, GENERAL PROVISIONS
(APPROVED MAY 25, 1961)

* * *

Article 4. CHANGES IN PLANS AND SPECIFICATIONS AND ADJUSTMENTS OF CONTRACT PRICE FOR CHANGES INCREASING OR DECREASING CONTRACT WORK. (a) The Contractor shall not depart from the requirements of the Plans and Specifications without prior written authorization by the Owner approved by the Board. In making application to the Owner for approval of a change in the Plans and Specifications, the Contractor shall set forth clearly the reasons for and the advantages of such change and shall submit its preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel, which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, of the acquired material which would not be used if the change is approved and of the effect, if any, of the proposed change upon any guarantee of the Contractor under this contract. The Owner shall consider the Contractor's request with all expedition and dispatch and shall present promptly all relevant data to the Board for approval, together with the Owner's recommended approval

or disapproval of the Contractor's request. The Owner shall advise the Contractor in writing of its decision on the Contractor's request, as approved by the Board.

(b) The Owner, with the approval or authorization of the Board, may direct any change in the Plans and Specifications effecting a deduction from or an addition to the contract work set out therein within the general scope thereof; provided, however, if a directed change in the Plans and Specifications affects a specific guarantee set out in the Specifications or in the Special Provisions and such effect is noted by the Contractor in its estimate of the change the guarantee will be modified to the extent determined by the Board. The Contractor shall proceed promptly with all changes authorized or directed by the Owner, and approved or authorized by the Board, as provided in this Article 4; provided, however, if the Board determines that the performance of the increased work incident to a major change will subject the Contractor to damages from the consequent delay of other work of the Contractor then under contract, the Contractor shall not be required to proceed with such additional work unless the Owner agrees to pay to the Contractor such damage costs as determined and approved by the Board.

(c) In connection with the consideration of a proposed change in the Plans and Specifications initiated by the Owner, the Owner may request (if the proposed change makes a major change in the Plans and Specifications such request shall be approved by the Board) the Contractor to submit to the Owner the Contractor's preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, or acquired material which would not be used if the change is

approved and of the effect, if any, of the proposed change on any guarantee of the Contractor under this contract and, if the change is a major change, the damage cost referred to in 4(b) above. Said preliminary estimate shall be submitted to the Owner within the time determined by the Board to be reasonably required for the preparation of such estimate. The Owner and the Board shall consider such preliminary estimate. Within a reasonable time the Contractor shall be directed to proceed by the Owner, as approved by the Board, or shall be advised by the Owner that the proposed change will not be directed. In the event the proposed change is not directed, and the Board determines that the change proposed was a major change in the contract work, the Contractor shall be reimbursed for the engineering and estimating costs involved, as determined by the Board.

(d) Promptly and within a reasonable time, as determined by the Board, after receipt of directions from the Owner, as approved or authorized by the Board, to make a change in the Plans and Specifications, or authorization by the Owner as approved or authorized by the Board of a change in the Plans and Specifications, requested by the Contractor, the Contractor shall furnish to the Owner, in writing, a statement of its detailed estimate of the net increase or decrease in the cost of the contract work and probable delay in delivery of the Vessel to result from such change.

(e) The Owner shall transmit such statement to the Board which shall consider the Contractor's statement and on the basis thereof and on the basis of such other evidence as the Board may deem relevant shall, as soon as practicable, approve or disapprove the Contractor's estimate. The Owner shall promptly notify the Contractor of the

Board's approval or disapproval of the Contractor's estimate. Notwithstanding a dispute in connection with the Contractor's estimate of the cost of a change, the Contractor shall, nevertheless, proceed promptly with the work covered by such directed or approved change. One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the contract price as an adjustment thereof. In the event of a net decrease in contract cost in the total of all such cost estimates the Contract Price shall be reduced by the amount of such net decrease.

(f) In the event the Specifications provide a contract price dollar allowance for specified material or equipment to be purchased by the Contractor upon direction of the Owner, with the approval of the Board, such purchases shall be made in conformity with the provisions of General Order No. 37 of the Federal Maritime Board. The Contract Price will be adjusted in accordance with the provisions of this Article 4 to the extent that the total of such purchases is greater or less than the allowance provided for in the Specifications.

* * *

Article 28. Optional Termination by the Board. (a) The performance of work under this contract may be terminated by the Board in accordance with this Article 28 in whole, or from time to time, in part, whenever the Board shall determine that the Owner is in default under the contract as provided in Article 31 of these General Provisions, or shall determine that such termination is in the best interests of the United States. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of

work under this contract is terminated, and the date upon which termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Board, the Contractor shall (1) stop the contract work on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services or facilities except as may be necessary for the completion of such portion of the contract work as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Owner and the Board, or to the Owner or the Board, as directed by the Board, in the manner, at the times, and to the extent directed by the Board, all of the right, title and interest of the Contractor under the orders or subcontracts so terminated; (5) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Board, to the extent they may require, which approval or ratification shall be final for all purposes of this Article 28; (6) transfer title (to the extent that title has not already been transferred or vested in the Owner) and deliver to the Owner or the Board, in the manner directed by the Board to the extent and at the times directed by the Board (i) the fabricated or unfabricated parts, work-in-process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if this contract had been completed, would have been required to be furnished to the Owner and the Board; (7) use its best efforts to sell in the manner, at the times, to the extent, and at the price or

prices directed or authorized by the Board, any property of the types referred to in provision (6) of this paragraph (b); provided, however, that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Board; and provided, further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Owner and the Board or the Owner or the Board to the Contractor under this contract or shall otherwise be credited to the price or cost of work covered by this contract or paid in such other manner as the Board may direct; (8) complete performance of such part of the contract work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Board may direct, for the protection and preservation of the property related to this contract, which is in possession of the Contractor and in which the Owner and the Board or the Owner or the Board have or may acquire an interest. At any time after expiration of the plant clearances period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Board a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Owner or the Board, and may request the Board to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Owner or the Board will accept title to such items and remove them or enter into a storage agreement covering the same; provided that the list submitted shall be subject to verification by the Board upon removal of the items, or if the items are stored, within

forty-five (45) days from the date of submission of the list, and any necessary adjustments to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Board its termination claim in the form and with the certification prescribed by the Board. Such claim shall be submitted promptly, but in no event later than one (1) year from the effective date of termination, unless one or more extensions in writing are granted by the Board upon request of the Contractor made in writing within such one-year period or authorized extension thereof. However, if the Board determines that the facts justify such action, it may receive and act upon any such termination claim at any time after such one-year period or any extension thereof. Upon failure of the Contractor to submit a termination claim within the time allowed, the Board may determine, on the basis of information available to it, the amount, if any, due to the Contractor by reason of the termination, and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c) above, the Contractor and the Board may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of contract work pursuant to this Article 28, which amount or amounts may include a reasonable allowance for profit on contract work completed. This contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this Article 28 prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Board to agree upon the whole amount to be paid to the Contractor by reason of the termination of contract work pursuant to this Article 28 shall be deemed to limit, restrict, or otherwise

determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Board to agree in whole or in part, as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of contract work pursuant to this Article 28, the Board shall determine on the basis of information available to it the amount, if any due to the Contractor by reason of the termination and shall pay the Contractor the amount so determined as follows:

(1) For completed contract work accepted by the Owner or the Board (or sold or acquired as provided in paragraph (b)(7) above) and not theretofore paid for, a sum equivalent to the aggregate price for such contract work computed in accordance with the price or prices specified in this contract, appropriately adjusted for any saving of freight or other charges.

(2) The total of—

(i) The costs incurred in the performance of the contract work terminated, including initial costs and preparatory expenses allocable thereto, but exclusive of any costs attributable to contract work paid or to be paid for under paragraph (e)(1) hereof.

(ii) The cost of settling and paying claims arising out of the termination of contract work under subcontracts or orders, as provided in paragraph (b)(5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of contract work or material delivered or services furnished

by subcontractors or vendors prior to the effective date of the Notice of Termination, which accounts shall be included in the costs payable under (i) above).

(iii) A sum equal to 2% of that part of the amount determined under (i) which represents the cost of material not processed by the Contractor, plus a sum equal to 8% of the remainder of such amount, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under subdivision (i) above, which amount for the purpose of this subdivision (iii) shall exclude any charges for interest on borrowing; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement, including accounting, legal, clerical and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract. The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of work not terminated. Except for normal spoilage, and ex-

cept to the extent that the Owner and the Board shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in paragraph (e)(1) and paragraph (e)(2)(i), the fair value, as determined by the Board, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Owner and the Board, or to a buyer pursuant to paragraph (b)(7).

(f) Any determination of costs under paragraph (c) or (e) of this Article 28 shall be governed by Section XV, Armed Services Procurement Regulations, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under Article 36 of these General Provisions, entitled "Disputes", from any determination made by the Board under paragraph (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time the Contractor shall have no such right of appeal. In any case, where the Board has made a determination of the amount due under paragraph (c) or (e) above, the Owner and the Board shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Board, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this Article 28 there shall be deducted (1) all unliquidated advance or other unliquidated payments on account theretofore made to the Contractor, (2) any claim which the Owner or the Board may have against the Contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies

or other things acquired by the Contractor or sold pursuant to the provisions of this Article 28 and not otherwise recovered or credited by the Owner and the Board.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Owner and the Board a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such adjustment as may be agreed upon by the Contractor, Owner and the Board shall be made in such price or prices.

(j) The Board may from time to time, under such terms and conditions as they may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Board the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Article 28, such excess shall be payable by the Contractor to the Owner and the Board upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Owner and the Board; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten (10) days after the date of such retention or disposition.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective

date of termination and for a period of six (6) years after final settlement under this contract, shall preserve and make available to the Board at all reasonable times at the office of the Contractor but without direct charge to the Board all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Board, photographs, micro-photographs, or other authentic reproductions thereof.

* * *

Article 31. DEFAULT OF OWNER IN CONTRACT PAYMENTS. —(a) In the event that the Owner shall fail to make the payments provided to be made by the Owner to the Contractor pursuant to the Special Provisions and the General Provisions of this Contract at the respective times provided for such payments, the Contractor upon such failure of the Owner may give to the Owner written notice of such failure and a copy of said notice shall be delivered to the Board by the Contractor; provided, however, that in the event the failure of the Owner involves a matter as to which the Owner has appealed to the Board pursuant to Article 36 of these General Provisions, such notice shall not be given until after the Board's decision if the payment in question is the subject of the appeal and a written copy of said notice shall be delivered to the Board by the Contractor. The Owner shall have fifteen (15) days to make the payment covered by the notice, or such longer period as may be agreed by the Contractor and the Board upon a showing that the Owner has taken steps sufficient to remedy the failure.

(b) In the event the Owner fails after such fifteen (15) days or extended period to make the payment set out in the notice provided for in paragraph (a) above, the

Contractor may deliver to the Owner a notice of default and deliver a copy of such notice of default to the Board.

(c) Within fifteen (15) days after it receives the Contractor's notice of the Owner's default, or such longer period as may be agreed by the Contractor and the Board upon a showing that the Owner has taken steps sufficient to remedy the failure, the Board shall (i) give the Contractor written notice of its election to assume the obligations of the Owner to complete the payments required to be made to the Contractor by the Owner under this contract, or (ii) give the Contractor Notice of Optional Termination pursuant to Article 28 of these General Provisions. In the event the Board assumes the Owner's obligation to perform its obligations under this contract, the Board shall promptly pay all delinquent payments of the Owner. A copy of the Board's notice to the Contractor shall be delivered to the Owner. All rights of the Owner under this contract and all title of the Owner in the Vessel and in the contract materials shall vest in the Board as of the date of said notice. The vesting of all of the Owner's right and title as hereinabove provided is made to enable the Board to thereafter proceed in a manner it deems best, but such vesting shall be without prejudice to the rights, if any, of the Owner as between the Owner and the Board.

(d) The provisions of this Article 31 shall in no way restrict or prejudice the right of the Contractor to pursue its remedies in regard to any default of the Owner in any of the Owner's obligations under this contract other than payments to be made by the Owner.

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Article 36. DISPUTES.—Any action, omission, direction, decision or determination of the Board, the Owner or the Contractor under this contract may be the subject of a

dispute. Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction, of the Maritime Administration, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor and to the Owner, which decision shall be final and conclusive and shall bind all parties to this contract unless within thirty (30) days from the date of receipt of such copy the Contractor or the Owner appeals from said decision by mailing or otherwise furnishing said Chief, Office of Ship Construction, a written appeal addressed to the Board. The decision of the Board on any question of fact, unless determined by a court of competent jurisdiction to have been fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence, shall be final and conclusive and shall bind all the parties to this contract. In connection with any appeal proceeding under this Article 36, the Contractor and the Owner shall be afforded an opportunity to be heard before the Board or before the duly authorized representative or representatives of the Board appointed for the hearing of said appeal and an opportunity to offer evidence in support of or in opposition to the appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract work and in accordance with the decision of said Chief, Office of Ship Construction. The fact that the Owner, with or without comment, refers to the Board as hereinbefore provided, the Contractor's estimates as to the cost and time of making changes, shall not prejudice the rights of any party to have any dispute relating thereto decided under this Article 36.

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